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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 JEFFREY D. DYKES,

10 Plaintiff,

CASE NO. C16-5649-MAT

11 v.

12 NANCY A. BERRYHILL, Deputy  
Commissioner of Social Security for  
Operations,

ORDER RE: MOTION FOR EQUAL  
ACCESS TO JUSTICE ACT FEES

13 Defendant.

14  
15 INTRODUCTION

16 Plaintiff filed a motion for attorney fees and expenses pursuant to the Equal Access to  
17 Justice Act (EAJA), 28 U.S.C. § 2412. (Dkt. 32.) He seeks \$7,491.98 in fees<sup>1</sup> and \$13.75 in  
18 expenses. The Commissioner argues plaintiff is not entitled to EAJA fees because the  
19 Commissioner's position was "substantially justified." (Dkt. 33.) The Commissioner alternatively  
20 requests the Court find the fee request unreasonable and award a reduced amount. The Court, for  
21 the reasons set forth below, concludes plaintiff's motion should be GRANTED and plaintiff

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23 <sup>1</sup> This amount includes the \$7,196.79 in fees originally sought and an additional \$295.19 in fees  
for 1.5 out of 2.0 hours spent preparing the reply in support of the motion. (See Dkt. 34 and Dkt. 34-1.)

1 awarded the fees and expenses requested.

## 2 DISCUSSION

3 Under EAJA, the Court awards fees and expenses to a prevailing party in a suit against the  
4 government unless it concludes the position of the government was “substantially justified or that  
5 special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). Having secured a  
6 remand of this matter, plaintiff is the prevailing party. *Akopyan v. Barnhart*, 296 F.3d 852, 854  
7 (9th Cir. 2002). Nor are there any special circumstances that would make an award unjust.

### 8 A. Substantial Justification

9 The Commissioner’s position is deemed substantially justified if it meets the traditional  
10 standard of reasonableness, meaning it is “justified in substance or in the main, or to a degree that  
11 could satisfy a reasonable person.” *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (quoted  
12 sources and internal quotations omitted). While the government’s position need not be correct, it  
13 must have “reasonable basis in law and fact.” *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552,  
14 566 n.2 (1988)). “The government bears the burden of demonstrating substantial justification.”  
15 *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (quoting *Gonzales v. Free Speech*  
16 *Coalition*, 408 F.3d 613, 618 (9th Cir. 2005)).

17 In this case, the Court ordered a remand for further administrative proceedings upon  
18 concluding the Administrative Law Judge (ALJ) erred in assessing the opinions of examining  
19 physician Dr. Donna Johns, mental health practitioner Sue Gebhardt, and treating physician Dr.  
20 Daniel Beavers. The Court noted further consideration of these medical opinions on remand could  
21 implicate the assessment of plaintiff’s symptom testimony, residual functional capacity (RFC),  
22 and the step five conclusion.

23 The Commissioner maintains the government’s position with regard to Drs. Johns and

1 Beaver was substantially justified because “some evidence” supports it. *Williams v. Bowen*, 966  
2 F.2d 1259, 1261 (9th Cir. 1991). The Commissioner points to aspects of the ALJ’s decision in  
3 which the Court found no error, such as the discounting of a Global Assessment of Functioning  
4 (GAF) score assigned by Dr. Johns and the ALJ’s conclusion elsewhere in the decision to not  
5 assign value to any of the GAF scores in the record. (Dkt. 29 at 7.) As the Commissioner observes,  
6 the Court also found the ALJ properly considered inconsistency in plaintiff’s presentation to Dr.  
7 Johns and Dr. Donald Ramsthal, and that Dr. Johns’ report provided some support for the ALJ’s  
8 conclusion Dr. Johns based her opinion on plaintiff’s self-reports and presentation. (*Id.* at 8.) With  
9 respect to Dr. Beavers, the Court stated it “could be said” the ALJ reasonably interpreted the  
10 opinion as speculative and couched largely in equivocal terms, inconsistent with treatment notes,  
11 and relying in large part on plaintiff’s self-reports, and that the ALJ accurately described GAF  
12 scores as not properly understood to represent a longitudinal picture of functioning over time. (*Id.*  
13 at 16.) The Commissioner construes the Court’s Order as not identifying any error in relation to  
14 Gebhardt. (Dkt. 33 at 3, n.1 (citing Dkt. 29 at 13).)

15 In considering substantial justification, the Court first considers the underlying agency  
16 action, meaning the decision of the ALJ, and then considers the government’s litigation position.  
17 *Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir. 2013). A “‘holding that the agency’s decision . . .  
18 was unsupported by substantial evidence is . . . a strong indication that the ‘position of the United  
19 States’ . . . was not substantially justified.’” *Id.* (quoting *Thangaraja*, 428 F.3d at 874). Indeed,  
20 only in a “‘decidedly unusual case’” will there be “substantial justification under the EAJA even  
21 though the agency’s decision was reversed as lacking in reasonable, substantial and probative  
22 evidence in the record.” *Thangaraja*, 428 F.3d at 874 (quoted case omitted).

23 Where the government’s underlying position was not substantially justified, the court

1 “need not address whether the government’s litigation position was justified.” *Meier*, 727 F.3d at  
2 872 (citing *Shafer v. Astrue*, 518 F.3d 1067, 1072 (9th Cir. 2008)). Instead, “[b]ecause the  
3 government’s *underlying* position was not substantially justified, we award fees, even if the  
4 government’s *litigation* position may have been justified.” *Tobeler v. Colvin*, 749 F.3d 830, 834  
5 (9th Cir. 2014). Also, in considering substantial justification, the Court looks only to whether the  
6 “position on the . . . issues that led to remand was not substantially justified.” *Id.* at 834-35  
7 (rejecting district court’s reliance on the fact that it found only one error and affirmed the remainder  
8 of the ALJ’s conclusion as the rationale for finding substantial justification) (quoting *Flores v.*  
9 *Shalala*, 49 F.3d 562, 564 (9th Cir. 1995) (emphasis added)). *Accord Gardner v. Berryhill*, 856  
10 F.3d 652, 656-57 (9th Cir. 2017) (“[T]he district court must determine whether the government’s  
11 position regarding the specific issue on which the district court based its remand was ‘substantially  
12 justified[.]’”; noting the question was not whether other evidence could support a denial of benefits  
13 or whether a denial might ultimately be sustained, “[i]t was whether the actual decision that was  
14 made by the ALJ could be affirmed at that time by the district court in light of the new evidence  
15 in the record.”)

16 The Commissioner here addresses aspects of the ALJ’s assessment the Court did not find  
17 in error. The Commissioner fails to address the errors identified by the Court and resulting in the  
18 remand. For example, the Court found that, while there was some support for the ALJ’s conclusion  
19 Dr. Johns relied on plaintiff’s self-reports, Dr. Johns’ report also reflected consideration of her  
20 own findings. (Dkt. 29 at 9.) Those findings included moderate impairment in day-to-day  
21 activities indicated by plaintiff’s inability to engage in any sustained activities or use any persistent  
22 concentration, and numerous pertinent findings on mental status examination, including, but not  
23 limited to, “behavioral distraction with frequent inability to respond to questions regarding

1 personal information and infrequent, hesitant eye contact” and “confused content of thought with  
2 evidence of moderate levels of hallucinations[.]” (*Id.*) Also, while elsewhere in the decision  
3 providing specific and legitimate reasons in relation to all GAF scores in the record, the ALJ erred  
4 in stating that Dr. Johns and Gebhardt ““explicitly”” based the GAF scores they assigned on factors  
5 irrelevant to the disability analysis. (*Id.* at 6-7 (discussing differences between Axis IV,  
6 psychosocial and environmental problems, and Axis V, the GAF scale, of the Multiaxial  
7 Assessment System; noting Dr. Johns did not provide any explanation for the GAF score) and at  
8 13 (noting Gebhardt did not explicitly base her GAF score on irrelevant factors and could have  
9 based the score on her clinical observations or findings on examination, such as plaintiff’s  
10 difficulty sitting in chair, impaired impulse control, cognition, and memory recall, impairment in  
11 intelligence, and concrete abstract abilities).) Further, despite some arguably unobjectionable  
12 criticisms of the opinions of Dr. Beaver, the ALJ’s lengthy discussion of extra-record evidence at  
13 hearing regarding Dr. Beaver and failure to address that discussion in the decision “called into  
14 question” the ALJ’s consideration of this opinion evidence and necessitated further consideration  
15 and clarification on remand. (*Id.* at 16.) Finally, all of the errors identified by the Court potentially  
16 implicated the remainder of the ALJ’s decision.

17       The Court finds nothing in the Commissioner’s opposition to the motion for EAJA fees to  
18 show the ALJ’s findings with regard to the above-described errors were supported by substantial  
19 evidence. The underlying action was not substantially justified. *See, e.g., Meier*, 727 F.3d at 872  
20 (no substantial justification where ALJ failed to provide specific and legitimate reasons for  
21 rejecting physician’s opinion and clear and convincing reasons for discounting plaintiff’s  
22 credibility). Even though it need not be considered, the Court also finds an absence of substantial  
23 justification for the agency’s litigation position. The Commissioner does not meet her burden of

1 demonstrating substantial justification as a basis for opposing EAJA fees.

2 B. Reasonableness of Fees

3 The Court may award EAJA fees for attorney hours reasonably expended by plaintiff's  
4 counsel. 28 U.S.C. § 2412(d)(2)(A). "The most useful starting point for determining the amount  
5 of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a  
6 reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "[E]xcessive, redundant,  
7 or otherwise unnecessary" hours should be excluded from the fee award. *Id.* at 434. The Court  
8 must also consider the results obtained when determining whether the fees requested by a  
9 prevailing party for an unsuccessful appeal are reasonable. *Atkins v. Apfel*, 154 F.3d 986, 986, 989  
10 (9th Cir. 1998) (citing *Hensley*, 461 U.S. 424).

11 "[T]he fee applicant bears the burden of establishing entitlement to an award and  
12 documenting the appropriate hours expended[.]" *Hensley*, 461 U.S. at 437. However, "the party  
13 opposing the fee application has a burden of rebuttal that requires submission of evidence to the  
14 district court challenging the accuracy and reasonableness of the hours charged or the facts asserted  
15 by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98  
16 (9th Cir. 1992) (citations omitted).

17 The Commissioner avers plaintiff's fee request is unreasonable given the limited nature of  
18 his success. *See Hensley*, 461 U.S. at 436 (where "a plaintiff has achieved only partial or limited  
19 success, the product of hours reasonably expended on the litigation as a whole times a reasonable  
20 hourly rate may be an excessive amount."); *Blair v. Colvin*, No. 13-35717, 2015 U.S. App. LEXIS  
21 12992 at \*4 (9th Cir. Jul. 27, 2015) (district court did not abuse its discretion by reducing fees  
22 based on limited success where plaintiff did not receive an award of benefits, as had been  
23 requested, and the court limited the scope of remand to reassessing several opinions regarding

1 plaintiff's ability to handle workplace stress). The Commissioner asserts the Court found only two  
2 errors out of seventeen total errors alleged. The Commissioner argues this limited success justifies  
3 a reduction in the award "by 15/17", the proportion of issues on which plaintiff did not prevail,  
4 and an award of \$846.68 in fees, and no additional fees associated with the motion under  
5 consideration. (Dkt. 33 at 4-5.)

6 Plaintiff, in fact, demonstrated error in relation to three medical opinions, necessitating  
7 reconsideration of those opinions and, as may be warranted, further consideration of plaintiff's  
8 symptom testimony, the RFC assessment, and the step five conclusion. Plaintiff received the exact  
9 relief requested, a remand for further proceedings. (*See* Dkt. 26 at 19, Dkt. 28 at 10, and Dkt. 29  
10 at 29.)

11 A reduction in fees is not warranted based simply on the fact the Court did not find all of  
12 plaintiff's arguments persuasive. As explained in *Hensley*:

13 Where a plaintiff has obtained excellent results, his attorney should  
14 recover a fully compensatory fee. Normally this will encompass all  
15 hours reasonably expended on the litigation, and indeed in some  
16 cases of exceptional success an enhanced award may be justified. In  
17 these circumstances the fee award should not be reduced simply  
18 because the plaintiff failed to prevail on every contention raised in  
19 the lawsuit. Litigants in good faith may raise alternative legal  
20 grounds for a desired outcome, and the court's rejection of or failure  
21 to reach certain grounds is not a sufficient reason for reducing a fee.  
22 The result is what matters.

19 461 U.S. at 435 (internal citation omitted). Nor can it be said plaintiff "failed to prevail on a claim  
20 that is distinct in all respects from his successful claims," allowing for a determination that "the  
21 hours spent on the unsuccessful claim should be excluded in considering the amount of a  
22 reasonable fee." *Id.* at 440. As held by the Supreme Court in *Hensley*: "Where a lawsuit consists  
23 of related claims, a plaintiff who has won substantial relief should not have his attorney's fee

1 reduced simply because the district court did not adopt each contention raised.” *Id.* The Court,  
2 for these reasons, finds no basis for the Commissioner’s opposition to the reasonableness of the  
3 EAJA fee request.

4 The Commissioner does not identify any excessive, redundant, or otherwise unnecessary  
5 hours spent in relation to this case. Considering the complexity of the issues raised, the record,  
6 and the briefing submitted, the Court finds the request for 35.4 attorney hours and 4.1 paralegal  
7 hours reasonable. *See generally Costa v. Comm’r of SSA*, 690 F.3d 1132, 1136 (9th Cir. 2012)  
8 (while court may consider the fact many district courts have “noted that twenty to forty hours is  
9 the range most often requested and granted in social security cases”, it may not “drastically reduce  
10 awards simply because the attorney has requested compensation for more than forty hours or make  
11 reductions with a target number in mind.”; determination of amount of time spent “will always  
12 depend on case-specific factors including, among others, the complexity of the legal issues, the  
13 procedural history, the size of the record, and when counsel was retained.”) The Court, for these  
14 reasons, finds plaintiff entitled to the fees and expenses requested.

#### 15 CONCLUSION

16 Plaintiff’s motion (Dkt. 32) is GRANTED. Plaintiff is entitled to an award \$7,491.98 in  
17 EAJA fees and \$13.75 in expenses. Subject to any offset allowed under the Treasury Offset  
18 Program as discussed in *Astrue v. Ratliff*, 560 U.S. 586 (2010), payment of the award should be  
19 made to plaintiff’s attorney. The Clerk shall send copies of this Order to the parties.

20 DATED this 26th day of March, 2018.

21 

22 Mary Alice Theiler  
23 United States Magistrate Judge